IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO. 13 OF 2006.

1. Mrs. Elvira Dias,
   aged 56 years,
   r/o. H.No. 4/42A, Porbawado,
   Calangute, Bardez-Goa.

2. Pedro Dias,
   aged 62 years,
   r/o. H.No. 4/42/A, Porbawado,
   Calangute Bardez-Goa. ..... Petitioners

V e r s u s

1. Executive Magistrate III(Bardez),
   at Mapusa, Mapusa, Bardez-Goa.

2. State
   represented by Miss Kalindi G. N. Burye,
   Police Sub Inspector,
   Calangute Police State,
   Calangute, Bardez-Goa.

3. Mrs. Linda Fernandes,
   Major in age, H.No. 1702(2),
   Porbawado, Calangute,
   Bardez-Goa. ..... Respondents

Mr. P. A. Kamat, Advocate for the Petitioners.

Ms. W. Coutinho, Public Prosecutor for the Respondent nos. 1 and 2.

Respondent no.3 present in person.

CORAM: N. A. BRITTO, J.

DATE: 12th July, 2006.

JUDGMENT

Heard Shri Kamat, the learned Counsel on behalf of the petitioners who are the opponents, and respondent no.3 in person, who is the first informant in proceedings under Section 133 of the Code (Code of Criminal Procedure, 1973), before the Executive Magistrate at Bardez, Goa. As stated by Shri Kamat on behalf of the petitioners, the challenge in this petition is restricted to Order dated 25.04.2006 of the learned Executive Magistrate.

2. It appears that there was a property admeasuring 900 square metres surveyed under no. 363/18 belonging to Mr. Peter @ Willy and Sofia Lobo. The father of the said informant-respondent no.3, by Deed dated 07.10.1983, purchased the southern portion of the said property admeasuring about 525 square metres and it is her case that in the year 1986 or thereabout, her father fenced the said property. The petitioners Pedro and Elvira Dias by Deed dated 14.07.1998, purchased the northern portion of the said property admeasuring about 236.4 square metres and

the balance in between the said two portions was gifted by the said sellers admeasuring 138.6 metres in favour of the Village Panchayat. On behalf of the parties, it is stated that there is a tarred road in existence across the said property and in between the portions purchased by petitioners and respondent no. 3 and the said road is in existence from the year 1994-1995. The informant-respondent no.3, filed a complaint to the Calangute Police Station alleging that the petitioners had put rubble stones and laid concrete poles on the said road reducing the area to nearly half of the original area of three metres width which was existing for years and thereupon a report was submitted by the Police Sub-Inspector of Calangute Police Station. On receipt of the said report dated 20.06.2005, along with the written complaint of respondent no.3, the Executive Magistrate was pleased to forward the same for inquiry to the Talathi, Calangute, and the said Talathi vide his report dated 07.07.2005, reported to the Executive Magistrate that he had inspected the site and had found that the petitioners had erected the cement poles and had dumped mud at the side of the public road outside their compound wall reducing the size of the tar road and causing great hardship and inconvenience to the public. The said Talathi also stated that the petitioner Pedro Dias had stated that the respondent no.3 and their neighbours had not maintained the access which was kept by the original

landlord and had erected their compound wall on the road without maintaining the set backs.

3. Thereafter, a conditional Order came to be made on 19.07.2005, by the learned Executive Magistrate calling upon the petitioners to remove the concrete poles erected on the public road and the mud within a period of seven days or to appear before his Court and show cause as to why the said conditional Order should not be made absolute. It appears that the grievance of respondent no.3 is shared by one B. L. Franco and 15 others who have also submitted an application to the Executive Magistrate after the said conditional Order was made. In reply to the show cause notice, the petitioners, inter alia, stated that the proceedings were not maintainable and the learned Executive Magistrate had no jurisdiction and the issue was purely a civil dispute and the said informant ought to have approached the Civil Court and, therefore, there was no reason to pass the said conditional Order. The petitioners also stated that they had not done any encroachment on the public road and further stated that the said cement poles were existing outside the road portion and in the private property of the petitioners. The petitioners also stated that it is the informant who had encroached on the road by constructing a laterite stone

compound wall on the road and because of that, the road area was reduced and, therefore, it is necessary to verify the Sale Deed and remove the encroachment made by her on the road. The petitioners also stated that a Surveyor could be appointed to verify the exact road area as per the Sale Deed of the informant and the petitioners and which would show the falsity of the informant's complaint. The petitioners also stated that the proceedings were initiated at the behest of the informant with the connivance of the police. It appears that on 27.09.2005, the learned Executive Magistrate directed a Surveyor to be appointed to verify the boundaries of both the plots surveyed under no. 363/18 of Village Calangute and to find out the existence of three metres wide road and submit a report. Accordingly, a site inspection was fixed on 24.10.2005 and a report was submitted dated 07.11.2005. In the report dated 07.11.2005, the Surveyor intimated that the existing tar road was not shown in the new Survey plan and proceeded to survey the same and show it on the plan. However, he stated that in order to detect the encroachment on the road, the Executive Magistrate will have to refer to the plan of the Acquiring Department as it was difficult to detect whether the encroachment had been carried out on the land acquired or the land was donated by any private party, etc. That report was filed before the Executive Magistrate on

29.11.2005. It appears that on 13.12.2005, the learned APP, who was assisting in the inquiry being conducted by the learned Executive Magistrate, filed an application for fresh survey, and on 28.02.2006, another Order came to be passed to conduct fresh survey as per direction given on 27.09.2005. That could not be done on 28.03.2006, as it was noted that the said Surveyor who had earlier conducted the survey, was transferred. Subsequently, it appears that the Surveyor wanted the original copy of the plan of the property purchased by the petitioners without which he was unable to identify the plot and the petitioners were unwilling to produce the same and the petitioners were directed to give the original plan which is part of the Sale Deed, through which, they had purchased the suit property. The Surveyor was directed to identify the boundaries of survey no. 363/18 and the plot of the petitioners and report to him and, accordingly, the matter was adjourned to 19.05.2006. It is this Order dated 25.04.2006, which is challenged in this petition as being contrary to the Order dated 27.09.2005.

4. Petitioners contend that the said Order dated 25.04.2006, is contrary to the Order dated 27.09.2005 and it does appear that this contention is partly correct. In order to find out which is the area of 138.6

square metres gifted to the Panchayat by the erstwhile owners of survey no. 363/18, the original Sale Deeds of the portions purchased by the petitioners and the father of respondent no.3, would be necessary but it does appear that both the parties are extremely reluctant to submit their Sale Deeds and the reason behind that may not be very difficult to be found. It would be certainly in the interest of the Village Panchayat to locate the land gifted to them but that certainly could not be done in these proceedings. The proceedings started on the allegation made by the respondent no.3 and others that the petitioners had encroached the public road by erecting cement poles etc. and the said public road has been in existence, as already stated on behalf of the parties, from the year 1994-1995. The impugned Order in that it directs only the petitioners to submit their plan and not of the respondent no.3, is certainly contrary to the earlier order dated 27.09.2005 and in the absence of any reason as to why it was made in this manner and contrary to the Order dated 27.09.2005, it deserves to be set aside.

5. As already stated, both the parties are reluctant to submit the original of their Sale Deeds with plans attached. Is it because each of them or one of them, to some extent, has encroached the land gifted to the

Panchayat? In the light of the allegation in the complaint made and the conditional Order issued in the light thereof, no purpose would be served in trying to find out which land belongs to the Village Panchayat. The Village Panchayat would certainly be at liberty to take appropriate proceedings in that matter. The inquiry should be limited to the conditional Order made and, therefore, the impugned Order deserves to be set aside. The learned Executive magistrate is therefore directed to proceed with the inquiry in accordance with law and in the light of the conditional Order made. The petitioners would be free to prove their allegation that the said encroachment is in the land purchased by them.

6. With the above observation, the petition is allowed and the impugned Order is hereby set aside.

N. A. BRITTO, J.

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